agreement by paying the $55m, it would also work unjustly on the defendant by having to obey the injunction after the lapse of one year and three months. The plaintiff could then hold the seven lands in tandem even though that period had elapsed and they still had not got to the stage of approval for sub-division when it had one year and three months to run. The court should not shut its eyes to the present slow-down in the property market. The plaintiff's hope of parcelling and selling the parts in one year and three months in view of the slow-down is slim.

On the other hand, the ball is certainly at the plaintiff's feet. Without the aid of the court's injunction, the plaintiff can still complete the purchase. In the event that the defendant refuses to complete, it is still open to the plaintiff to apply for an early hearing of this suit for specific performance and pay the full purchase price, especially in the absence of any action by the defendant applying for a declaration that the agreement be terminated. In the event this takes place, the obtaining of the injunction is therefore an exercise in futility.

For the reasons given and having considered the justice of the case, I exercised my discretion by refusing the injunction sought by the plaintiff. The plaintiff's application was dismissed with costs to be taxed.

Application dismissed.

Solicitors: *AK Lee & Co; Mah-Kok & Din.*

Reported by *PS Ranjan*

Shell Malaysia Trading Sdn Bhd v Pemungut Duti Setem, Johore Bahru

HIGH COURT (JOHORE BAHRU) — ORIGINATING MOTION NO 32-6 OF 1988
ABU MANSOR J
7 JANUARY 1989

Revenue Law — Stamp duty — Instrument of lease of land — Lump sum consideration — Whether sum is either rent or is fine or premium — Whether instrument attracting stamp duty as for an instrument of a conveyance for the sum — Stamp Ordinance 1949, Sch 1 item 49(1)(a) & 49(1)(b)

The applicant was the lessee of a piece of land under an instrument of lease. The respondent contended that the stamp duty payable on the instrument under the Stamp Ordinance 1949 was equal to the stamp duty for an instrument of conveyance on the ground that the instrument was a lease or an agreement for a lease in consideration of a fine or premium and without rent under Sch 1 item 49(1)(b) of the Ordinance. The applicant contended that the instrument came under Sch 1 item 49(1)(a) of the Ordinance as a lease or agreement for a lease without a fine or premium when the average rent was at a certain amount. The applicant, not agreeing with the stamp duty imposed, brought an appeal to the High Court by way of case stated.

The lease was for a period of 30 years and it was a term of the lease that the lessee was to pay the lessor the sum of $135,000 constituting 30% of the total rental upon execution of the lease agreement and the balance of the total rental in the sum of $315,000 upon registration of the lease agreement. It was a term of the lease that the lease may be determined before the expiration of the 30-year period upon the happening of certain events. It was also a term of the lease that in the event of an earlier determination of the lease, there would be a proportionate refund of the amount paid by the lessee to the lessor commensurate with the unexpired portion of the term of the lease.

Held, allowing the applicant's appeal:
Since the lease agreement contained provision for earlier determination of the lease upon the happening of certain events and there was also provision for proportionate refund of the lump sum paid, the lump sum was rent and not premium. Since the lump sum was rent, the instrument was therefore excluded by the terms of Sch 1 item 49(1)(b) of the Ordinance. For the lump sum to be under Sch 1 item 49(1)(b), it must be without rent. Since the lump sum was rent, it could not therefore be premium or fine. As the lump sum was not a premium or fine, the instrument was therefore an instrument of lease or agreement for lease of land or other immovable property granted or made under item 49(1)(a) without fine or premium.

Cases referred to
1 *Nixon* v *Doney* [1961]SR (NSW) 311 (folld)
2 *Frazier* v *Commissioner of Stamp Duties* (NSW) (SC) NSW-85 ATS 4735 (folld)

Legislation referred to
Stamp Ordinance 1949 s 39, Sch 1 items 49(1)(a), 49(1)(b)

Reginald Vallipuram for the applicant.
Abdul Karim bin A Jalil (Senior Federal Counsel) for the respondent.

Cur Adv Vult

Abu Mansor J: This appeal, by way of case stated, seeks to find the answer whether the Assistant Collector of Stamp Duty Johore Bahru was correct in imposing the stamp fees for a document which the collector has identified as being under the heading 'Lease or Agreement For a Lease' in consideration of a fine or premium and without rent which is under Sch 1 item 49(1)(b) of the Stamp Ordinance 1949, thus attracting the same stamp duty as for an instrument of a conveyance for a sum equal to the amount of such consideration. The applicant contends that the instrument comes under Sch 1 item 49(1)(a) which was a lease or agreement for a lease without a fine or premium when the average rent was at a certain amount. The difference in stamp fees is quite substantial. Under Sch 1 item 49(1)(b), the stamp fees was $8,000 whereas if it were classified under Sch 1 item 49(1)(a), the stamp duties would only be $204.

The facts of the case leading up to the present application are as follows. On 31 December 1987, the Perbadanan Kemajuan Ekonomi Islam Negeri Johor ('lessor') executed an instrument of lease in favour of Shell Malaysia Trading Sdn Bhd ('lessee'). The subject land was HS(D) 15489 lot no PTD15387 mukim of Kluang of which the lessor is the proprietor. The said lease was for a term of 30 years commencing from 19 August 1987 till 18 August 2017.

The term of the said instrument, in particular cl 2(1), was as follows:

(a) The lessee was to pay the lessor the sum of $135,000 constituting 30% of the total rental upon the execution of the agreement.
(b) Subject to the lessor giving vacant possession of the said land to the lessee, to pay the lessor $315,000 constituting 70% of the total rental upon registration of the lease agreement.

When the instrument was presented for stamping on 26 January 1988, the assistant collector collected the stamp as already mentioned. The applicant, not agreeing with the stamp duty imposed, brings this appeal by way of case stated under s 39(1) of the Stamp Ordinance 1949.

Mr Reginald Vallipuram says that the instrument comes under Sch 1 item 49(1)(a) of the Ordinance. He says it was not correct for the collector to regard the instrument as coming under Sch 1 item 49(1)(b), treating the payment as a premium and imposing an ad valorem rate, as if it was a conveyance. Counsel submitted that the stamp duty to be collected should be under Sch 1 item 49(1)(a)(iv). In short, he said the issue for the determination of the court was whether the sum collected by the collector in fees should be under Sch 1 item 49(1)(b) or item 49(1)(a) thereof.

Counsel further argued that the answer depends on whether the sum of $450,000 paid or to be paid to the lessor was really premium and without rent or advance rental without rent or premium.

The applicant's counsel submitted that the answer can only be found in construing the memorandum of lease (exh A). In cll 1 and 2 of the lease, the words 'total rentals' had been used. The applicant's counsel submitted that the $450,000 was in fact rental for the use of the land though he concedes there was absence of any indication of what would be periodical payment of rent. Be that as it may, counsel says that if $450,000 is divided by 30 years, it would amount to $15,000 rent per year.

I agree with the authority cited by counsel for the applicant that whatever label the parties chose to employ in the instrument is not important. The burden is still on the court to interpret exh A. To this I will add, before there can be proper interpretation of whether the sum is premium or rental, there must also be a correct understanding of the terms rent or premium or fine. The cited case of *Nixon* v *Doney*[1] is enlightening and I quote at p 316:

> That the distinction under the Landlord and Tenant (Amendment) Act 1948-1958 between a 'premium' and 'rent' is not a distinction based upon the nomenclature used by the parties to a lease in making a promise or payment. It is a distinction of substance and not of language, a real distinction based upon real differences between the two concepts, and capable of being applied to any promise or payment on a consideration of all the circumstances of a transaction, including the provisions of the relevant lease excluding the labels employed by the parties therein or in making the payment.
>
> That the expressions 'bonus' and 'premium' on the one hand, and 'rent' on the other, have often been used to designate no more than two components in the full or true rent of premises - one component which, under the name of 'bonus' or 'premium', is made payable as a capital sum at the inception of a tenancy, and another component which, under the name of 'rent', is made payable by periodical instalments throughout its duration. The expression 'bonus' or 'premium' may, however, be used in a sense in which it is to be distinguished not only from the periodic rent payable under the lease but also from a lump sum payable by way of compounding of rent and in addition to the periodic rent: in this sense it is a personal promise in consideration of a lease being granted. If there is provision whereby liability to pay a 'premium' which is payable by instalments over the term is to cease on determination of the lease prior to its expiring by effluxion of time, or if there is a right in the lessee of pro tanto recoupment on premature determination of the tenancy, these are indications that the sum in question is not really a premium but is in truth and substance an additional rent.

If I understand the principal in *Nixon* v *Doney*,[1] the correct approach in answering the problem is to bear in mind what the hallmark of 'rent' and 'premium' is. If there is any provision whereby liability to pay a 'premium' which is payable by instalments over the term is to cease on determination of the lease prior to its expiring by effluxion of time, or *if there is a right in the lessee of pro tanto recoupment on premature determination of the tenancy, these are indications that the sum in question is not really a*

premium but is in truth and substance an additional rent. (Emphasis is mine.)

Then again in *Frazier* v *Commissioner of Stamp Duties*,[2] where in allowing the appeal, the Supreme Court of New South Wales said:

> The terms of the lease showed that the lump sum of $30,998 was paid for their use and occupation of the premises and not as a consideration for the granting of the lease. Consequently, the lump sum should be regarded as rent for the purposes of the relevant charge of duty and did not attract the higher duty payable on a premium. The determining clause that the court used to say that the payment was rental was cl 6 of the lease.
>
> Clause 6 of the lease is confirmatory of the inference to be drawn from cl 2(a). Clause 6 (so far as is relevant) is as follows:
>
> (a) The lessor shall have the right to require that this lease be surrendered in the event of any one or more of the following conditions:
> (i) the death of the lessee;
> (ii) that the lessee has ceased or proposes to cease to reside in the unit or is forced for any reason to vacate the unit as a permanent residence;
> (iii) that the lessee has failed to comply with any of the covenants terms or conditions contained in this lease and which failure remains unrectified after the expiration of twenty-eight (28) days prior written notice has been given by the lessor to the lessee in accordance with this lease;
> (iv) that the lessee has been declared bankrupt or that any of the assets of the lessee have been or are liable to be seized in execution of any judgment or that the lessee has compounded with or entered into an arrangement with any of his creditors;
> (v) that the lessee is a patient under the control of the Protective Commissioner of the Supreme Court of New South Wales; or
> (vi) that the lessee is habitually unable to care for himself.
>
> (c) In the event of the lessor exercising its right to require a surrender of this lease then the lessee shall be entitled to the compensation for the rent payable in advance as a lump sum for the unexpired term of this lease such sum to be the value which the lessor or an arbitrator appointed by it may reasonably determine to be the value of the residue of the term as at the date of notice of surrender *and* the lessee or his legal personal representatives shall and does, hereby appoint the lessor to be its attorney for that purpose to execute such documents as may be reasonably required to complete the surrender of this lease.

If we were to refer to cl 4(4) and 4(5) of our present instrument under consideration, the intention of the parties is clear that there should be proportionate refund of the amount paid to the lessor commensurate with the unexpired term in the event of an earlier termination of this lease. It reads as follows:

> (4) If the lessee shall fail to procure an unconditional licence to use the said land and the buildings erected thereon for the storage of petroleum products or for any of the other usual or other purposes of a filling and service station or having procured such a licence if the same is cancelled withdrawn or not renewed unconditionally or if it shall become otherwise unlawful or in the opinion of the lessee impossible or impracticable to use the said land and the buildings erected thereon advantageously for any of such purposes then and in any such cases the lessee shall have the right upon giving one calendar month's notice in writing to the lessor of its intention so to do to determine this lease and upon the expiry of such notice this lease shall cease and determine, subject to the provisions of cl 4(5) hereof.
>
> (5) The said advance rental referred to in cl 2(1)(a) and (b) hereof or a proportionate amount thereof which commensurates with the unexpired term under this agreement shall forthwith become refundable to the lessee from the lessor in the event of:
> (a) the lessor being in breach of any clause under this agreement; or
> (b) it becoming unlawful or in the opinion of the lessee impossible or impracticable to use the said portion for the purpose of storing and retailing of petroleum products and the selling of motor accessories; or
> (c) this agreement being terminated for whatever reason.

It is clear, therefore, that applying the authorities of *Nixon* v *Doney*[1] and *Frazier* v *Commissioner of Stamp Duties*,[2] since the lease contains provision for earlier determination of the lease upon the happening of certain events and there is also provision for proportionate refund of the lump sum paid, I am of the view that the lump sum was rent and not premium. Since it is rent, the instrument is therefore excluded by the terms of Sch 1 item 49(1)(b), for item 49 (1) reads:

> 49 Lease or Agreement for Lease:
> (1) Lease or agreement for lease of any land, house or other immovable property granted or made:
> (a) Without fine or premium when the average rent calculated for a whole year
> (i) does not exceed in value $100;
> (ii) exceeds $100 but does not exceed $250;
> (iii) exceeds $250 but does not exceed $500;
> (iv) exceeds $500, for every $250 or any part thereof.
> (b) In consideration of a fine or premium and *without rent*. (Emphasis is mine.)

For the lump sum to be under Sch 1 item 49(1)(b), it must be without rent. Since the lump sum is in my decided view rent, it cannot therefore be premium or fine. As it is not premium or fine, the instrument we are concerned with is, therefore, an instrument of lease or agreement for lease of land or other immovable property granted or made under Sch 1 item 49(1)(a) without fine or premium with the average rent calculated for a whole year to be $415,000.

That being my decision, I find the applicant has succeeded in this appeal. I order that the matter be remitted to the collector for collection of stamp duty under Sch 1 item 49(1)(a). There is no order as to costs.

Appeal allowed.

Solicitors: *Reginald Vallipuram & Co.*

Reported by *PS Ranjan*